

ORIGINAL

Before the
Federal Communications Commission
Washington, DC

In the Matter of)

)
Petitions of Qwest Corporation for)
Forbearance Pursuant to 47 U.S.C. § 160(c) in)
the Denver, Minneapolis-St. Paul, Phoenix,)
and Seattle Metropolitan Statistical Areas)
)

WC Docket No. 07-97

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Office of the Secretary

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

Qwest's petition for forbearance from selected Section 251(c) and incumbent LEC rules in the Phoenix MSA (the "Phoenix Petition") should be denied. The Phoenix Petition provides no evidence that would permit the Commission to conclude that Qwest has satisfied the statutory forbearance criteria. Although Qwest initiated the Omaha forbearance proceeding and should be entirely familiar with the *Omaha Forbearance Order*, the Phoenix Petition provides almost none of the types of evidence necessary to obtain forbearance under the tests laid out in that order or reaffirmed in the recent *Anchorage Forbearance Order*.

Qwest makes no effort to offer the kind of granular, wire-center level data regarding competitive facilities deployment or wholesale alternatives the Commission required in those cases. Instead, Qwest provides generic national, state, and MSA level data designed chiefly to demonstrate that competitors have gained market share in the Phoenix MSA at Qwest's expense. As the Omaha and Anchorage orders show, evidence of competitive market share is not sufficient to justify forbearance.

Moreover, even Qwest's lost market share showing is riddled with errors. Qwest relies on competitors that provide a number of services the Commission has rejected as irrelevant in previous proceedings (like wireless and voice over IP providers) or that "compete" in a way that is vaguely defined and impossible to quantify (like independent fiber providers). Qwest also relies on competition from AT&T and Verizon, even though both of those carriers have disavowed any future competition in residential telephone markets. Qwest's calculation of lost mass market share relies on a metric it calls "residential communications connections" that includes many service connections that are not substitutes, including wireless and voice over IP lines. In short, the bulk of Qwest's data regarding competition in the Phoenix MSA is both irrelevant and misleading.

When Qwest tries to show competition from cable providers like Cox and traditional wireline competitive LECs, it fares no better. In particular, Qwest's facilities deployment data is

incomplete and inconclusive. Indeed, Qwest makes no effort at all to show where wireline competitive LECs have deployed facilities. Qwest fails to compare Cox's facilities deployment data to Qwest's wire centers in any meaningful way. Consequently, nothing in the Phoenix Petition would help the Commission determine whether Cox or any other competitor has met the seventy-five percent (75%) facilities deployment threshold the Commission established for forbearance relief in Omaha and Anchorage.

The Phoenix Petition also fails to demonstrate that the conditions in Phoenix guarantee that available competitive alternatives for customers and carriers are sufficient to justify any of the particular forbearance requests Qwest makes. In fact, Qwest makes no effort to differentiate among the rules that are the subject of the Petition, relying instead on its apparent view that its lost market share justifies forbearance from whatever rules Qwest chooses.

In particular, Qwest never justifies its request for forbearance from its responsibility to provide unbundled access to inside wire subloops that competitors need to provide service to customers in multi-tenant environments ("MTEs"). The Commission has recognized the importance of competitive access to unbundled inside wire subloops in several orders and recently reaffirmed its conclusions in the *Anchorage Forbearance Order* and the *Inside Wire Declaratory Ruling*. Qwest does not mention why competitive conditions in Phoenix justify relief from the requirement. Indeed, exactly the opposite is true. Qwest has sought to interfere with Cox's access to Qwest inside wire subloops by making unsubstantiated charges that Cox technicians are damaging Qwest facilities when gaining access to connect new Cox customers. Audits have demonstrated that Qwest's claims are without merit, but Qwest continues to press these claims in an effort to convince regulatory authorities that Cox's competitive efforts in MTEs should be stopped or curtailed. Thus, even under the current rules, Qwest is seeking to thwart competition. Given the facts on the ground in Phoenix and Qwest's nonexistent showing of any alternatives to Qwest inside wire subloops, the Commission must reject forbearance from its unbundling requirement.

Qwest also fails to demonstrate that market conditions justify the other Section 251 and incumbent LEC forbearance it seeks. Qwest does not show that wholesale alternatives are available to the loop, transport, ONA, and CEI services Qwest currently provides. Furthermore, Qwest's pledge to continue providing wholesale inputs to competitive carriers is suspect in light of Qwest's unwillingness to conclude commercial agreements with wireline competitors in Omaha following the commission's grant of forbearance there. Thus, all of Qwest's Section 251 and incumbent LEC forbearance requests suffer from the twin defects of insufficient evidence and incomplete analysis. They each should be denied in turn.

At the same time, Cox does not object to Qwest's bid for non-dominant treatment at the federal level. Unlike the Section 251 and incumbent LEC forbearance tests, Qwest can satisfy non-dominance precedent by demonstrating that it has lost market share. To the extent the Commission considers forbearance from dominant carrier requirements, however, the Phoenix Petition to this limited extent should be treated as a request for declaratory ruling rather than for forbearance. The Commission should require Qwest to make the necessary showings under existing non-dominance precedent, permitting supplemental filings if necessary.

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COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc., on behalf of its affiliate Cox Arizona Telcom LLC (collectively, "Cox"), hereby submits these comments in response to the petition for forbearance submitted by Qwest Corporation ("Qwest") in the above-referenced proceeding for the Phoenix-Mesa-Scottsdale, Arizona Metropolitan Statistical Areas (the "Phoenix MSA").¹

I. INTRODUCTION

Cox is the leading competitive provider of facilities-based local telephone service in the United States, with more than 2.2 million residential lines and 180,000 business customers in service. Cox now provides local residential and business telephone service in each of its thirty-five markets across eighteen states. Cox's telephone service area includes parts of the Phoenix MSA.² In Phoenix, Cox's facilities-based telephone services include a mixture of traditional

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 07-97, filed April 27, 2007 (the "Phoenix Petition"). *See also* Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, *Public Notice*, WC Docket No. 07-97, DA 07-2291 (released June 1, 2007); Wireline Competition Bureau Grants Extension of Time to File Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, *Public Notice*, WC Docket No. 07-97, DA 07-3042 (released July 6, 2007). These comments respond specifically to the Phoenix Petition. Because Qwest's separate forbearance petitions for the Denver, Minneapolis-St. Paul, and Seattle markets are essentially the same as the Phoenix Petition, some of Cox's arguments also may have relevance to these other filings.

² Cox Arizona Telcom, LLC is an indirect, wholly-owned subsidiary of Cox Communications, Inc., and is the operating entity that holds the state certificate to provide telephone service in Arizona.

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circuit-switched and packet-switched offerings for both residential and business customers.³ Cox relies chiefly on its own network to compete with Qwest, and has been very successful in bringing facilities-based competition to the Phoenix MSA. Indeed, competition from Cox is the chief basis for the Phoenix Petition.

As in Omaha, Cox's competitive success in Phoenix has not diminished its need for the protections afforded by the Communications Act and the Commission's rules, particularly the network-access guarantees of Section 251.⁴ Qwest remains the sole carrier in Phoenix with a ubiquitous network capable of reaching virtually every home and office, and it remains the indispensable interconnecting carrier, with whom every new market entrant must interconnect and interact extensively.

Facilities-based providers like Cox have more limited needs than competitors that rely extensively on unbundled network elements or resale. Still, certain incumbent local exchange carrier ("LEC") obligations remain essential to facilities-based competition.⁵ These obligations include the duties to: (1) negotiate in good faith; (2) provide interconnection at any technically feasible point on reasonable, cost-based and non-discriminatory terms, including transit provided without unreasonable restrictions at cost-based rates; (3) provide collocation; (4) provide access to operational support system (OSS) interfaces and databases for E911, customer service record information, and directory listing information; and (5) provide unbundled access to inside wire subloop facilities in multi-tenant environments ("MTEs").⁶ Facilities-based competitive LECs

³ Cox's packet-switched voice service uses Internet Protocol but operates over facilities under Cox's control, not over the Internet.

⁴ See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order*, 20 FCC Red 19415, 19456 (2005) ("*Omaha Forbearance Order*").

⁵ See Comments of Cox, WC Docket No. 04-223 (Omaha Forbearance Proceeding) (filed August 24, 2004); Comments of Cox, WC Docket No. 06-172 (Verizon Forbearance Proceeding) (filed March 5, 2007); see also, e.g., Comments of Cox, IP-Enabled Services, WC Docket No. 04-36 (filed May 28, 2004).

⁶ 47 U.S.C. § 251(c)(1)-(3), (5)-(6); 47 C.F.R. §§ 51.301; 51.305; 51.319(b)(2), (f), (g); 51.323. As used herein, the term "inside wire subloop" refers to those facilities identified in Section 52.319(b)(2) of the Commission's rules and described in a number of Commission orders since 1996. See, e.g., Telecommunications Services Inside Wiring: Customer Premises Equipment;

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like Cox also must be guaranteed the right to seek redress from state public utility commissions for incumbent LEC misbehavior. If the Commission does not require Qwest to continue meeting facilities-based competitors' needs in these areas, Qwest will gain the power to leverage its ubiquitous network to stop emerging competition in its tracks.

Qwest seeks forbearance from a broad range of incumbent LEC and dominant carrier regulations. The requested relief falls into two broad categories. First, Qwest petitions for forbearance from a number of incumbent LEC regulations, including Section 251(c) loop and transport unbundling obligations and the Commission's comparably efficient interconnection ("CEI") and open network architecture ("ONA") requirements.⁷ Second, Qwest seeks relief from a number of dominant carrier regulations governing its mass market and enterprise services, which are imposed pursuant to Section 214 of the Act and Parts 61 and 63 of the Commission's rules.⁸

The Commission's most important task in considering these requests is to preserve a regulatory environment that allows competition to continue growing under free market conditions.⁹ Consequently, the Commission has adopted two very different tests for the two

Implementation of the Cable Television Consumer Protection and competition Act of 1992: Cable Home Wiring; Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop, *Report and Order and Declaratory Ruling*, 22 FCC Rcd 10640, 10661-66 (2007); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17184 (2003); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3791 (1999).

⁷ See Phoenix Petition at 3; see also 47 U.S.C. § 251(c), 271(c)(2)(B)(ii); 47 C.F.R. § 51.319(a), (b), (e).

⁸ See Phoenix Petition at 3; see also 47 U.S.C. § 214; 47 C.F.R. §§ 61.1, *et seq.*, 63.01 *et seq.* Qwest specifically identifies the following dominant carrier rules for which it seeks forbearance: 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-.49, 61.58-.59, 63.03-.04, and 63.60-.66. As the Commission explained at length in the *Omaha Forbearance Order*, relief may be granted to Qwest only for these rules from which Qwest clearly requested relief. See *Omaha Forbearance Order*, 20 FCC Rcd at 19424-25 & n.51 (citing Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, *Memorandum Opinion and Order*, 17 FCC Rcd 27000, 27005-06).

⁹ Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, *Memorandum Opinion and Order*, 22 FCC Rcd 1958, 1963-64 (2007) ("the

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types of relief Qwest seeks. In the Omaha and Anchorage cases, the Commission made clear that the main thrust of the Section 251 and incumbent LEC regulatory analysis is on competitive facilities deployment at the local, wire-center level.¹⁰ In those cases the Commission established a seventy-five percent (75%) competitive facilities coverage threshold; in wire centers where that threshold was met, forbearance from specified Section 251 regulations was granted; in wire centers where the threshold was not met, forbearance was denied.¹¹ Thus, where the Commission has not found substantial competitive facilities deployment at the wire-center level, it has refused to forbear from Section 251 incumbent LEC regulation, regardless of the level of competitive market share. Competitor market penetration in the MSA is the primary focus only for the purpose of the non-dominance analysis.¹²

Despite this Commission precedent, the theory of the Phoenix Petition appears to be that the Commission must grant forbearance for whatever rules Qwest identifies if Qwest can demonstrate a loss of retail market share and provide a list of competitors. This formulation misses the point of the Commission's cases and the required statutory analysis. In the first place, separate forbearance requests must be justified independently.¹³ Qwest makes no effort to separately justify why the various rules from which it seeks forbearance are no longer necessary. In particular, Qwest has offered no evidence that it should be freed of its duty to unbundle inside wire subloops to permit access to multi-tenant environments ("MTEs"). In Anchorage, the Commission recognized the importance of preserving competitive LEC unbundled access to this

Commission's analysis results in granting the incumbent LEC relief from its unbundling obligations where the level of facilities-based competition ensures that market forces will protect the interests of consumers and that Section 251(c)(3) unbundling regulation is, therefore, unnecessary and not in the public interest.") (the "*Anchorage Forbearance Order*").

¹⁰ See *Omaha Forbearance Order*, 20 FCC Rcd at 19444; *Anchorage Forbearance Order*, 22 FCC Rcd at 1971-72. The Commission also examines in this context the availability of competitive substitutes for incumbent LEC wholesale services. See *Omaha Forbearance Order*, 20 FCC Rcd at 19447; *Anchorage Forbearance Order*, 22 FCC Rcd at 1977.

¹¹ See *Omaha Forbearance Order*, 20 FCC Rcd at 19444; *Anchorage Forbearance Order*, 22 FCC Rcd at 1971-72.

¹² See *Omaha Forbearance Order*, 20 FCC Rcd at 19429.

¹³ See *id.* at 19423-24.

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network element, but Qwest provides no explanation why a different result should obtain in Phoenix.

Moreover, the Commission specifically rejected a retail market share test in considering Section 251 forbearance requests in Omaha and Anchorage in favor of the competitive facilities coverage standard. The Commission's standard recognizes that competition will be protected and promoted only where sufficient facilities-based deployment exists to make competition self-sustaining in the absence of existing regulatory safeguards.¹⁴ Qwest provides no basis for the Commission to deviate from that analysis here.¹⁵

Qwest's failure to provide anything resembling the necessary data is peculiar because Qwest was the petitioner in Omaha and must be aware of the standards the Commission established. Not only has Qwest failed to demonstrate that any competitors have deployed facilities to seventy-five percent (75%) of the end-user locations in any Phoenix wire center, the Phoenix Petition includes no evidence at all of competitive facilities deployment at the local, wire center level. For that reason, Qwest has not carried its burden under Section 10 and Commission precedent for forbearance from the incumbent LEC regulations identified in the Phoenix Petition.

At the same time, Cox does not object to treatment of Qwest as a non-dominant carrier in the Phoenix MSA. Under the Commission's dominant carrier precedent, Qwest's evidence of competitor market penetration in both the mass and enterprise markets is likely sufficient to sustain a finding of non-dominance. However, the hybrid forbearance/non-dominance analysis adopted in the *Omaha Forbearance Order* should not be applied here. Though the Commission granted forbearance from some dominant carrier regulations in Omaha, the far-reaching relief

¹⁴ See *Omaha Forbearance Order*, 20 FCC Rcd at 19444; *Anchorage Forbearance Order*, 22 FCC Rcd at 1964 (grant is appropriate "where the level of facilities-based competition ensures that market forces will protect the interest of consumers and that section 251(c)(3) unbundling regulation is, therefore, unnecessary and not in the public interest").

¹⁵ See *Omaha Forbearance Order*, 20 FCC Rcd at 19443-45; *Anchorage Forbearance Order*, 22 FCC Rcd at 1967.

sought by Qwest in this case warrants the sophisticated market power analysis performed in traditional dominance/non-dominance proceedings. Accordingly, the Commission should require Qwest to seek a declaratory ruling on the dominance/non-dominance question under the Commission's standard procedures.¹⁶

II. THE COMMISSION SHOULD ADHERE TO THE ANALYTIC FRAMEWORK ESTABLISHED IN THE OMAHA AND ANCHORAGE FORBEARANCE ORDERS.

In the *Omaha Forbearance Order*, the Commission developed the legal and analytic framework for forbearance. Each element of this analysis is designed to ensure that the Commission eliminates unnecessary regulations, but preserves those regulations necessary to allow competition to continue to develop. The Commission should adhere to its established framework here.

A. The Commission's Analysis Is Market- and Fact-Specific.

The Commission's analysis must be based on the prevailing facts and circumstances in the Phoenix MSA. Though the Commission has consolidated Qwest's petitions for the four separate MSAs, the *Omaha Forbearance Order* establishes that the Phoenix Petition must be analyzed separately from Qwest's other three forbearance petitions to determine whether relief is justified by the facts in the individual wire centers of the Phoenix MSA.¹⁷ Qwest's Petitions are nearly uniform, but the prevailing market conditions in the Phoenix, Seattle, Minneapolis-St. Paul and Denver MSAs are not. For example, establishing that there is a fully competitive market in Seattle would be irrelevant to the analysis of competition in Phoenix.

In keeping with its appropriately local focus, the Commission should continue to reject (as it did in Anchorage and Omaha) general evidence of nationwide, statewide, or MSA-wide competition that does not illuminate the specific competitive conditions in the individual areas

¹⁶ See *Omaha Forbearance Order*, 20 FCC Rcd at 19424-26.

¹⁷ See *id.*, 20 FCC Rcd. at 19423, n.46.

where Qwest seeks forbearance.¹⁸ Instead, the Commission should insist on the same granular Phoenix-specific data it required in Omaha and Anchorage. In the context of Section 251 and other incumbent LEC regulations, Qwest must show that strong and stable facilities-based competitors exist and that competitors can obtain necessary network facilities from providers other than Qwest. For dominant carrier regulations, Qwest must show that competitors have attained a market share sufficient to eliminate its market power. These issues can be examined effectively only at the local level.

B. The Commission Must Separately Evaluate Each of Qwest's Individual Forbearance Requests.

The Commission should analyze each Qwest request for relief separately to determine whether Section 10(a) of the Act is satisfied.¹⁹ The exacting standards of Section 10(a) require particularized Commission findings that relieving Qwest of its responsibilities under existing incumbent LEC and dominant carrier regulations will not lead to: (1) unjust or unreasonably discriminatory rates and practices; (2) inadequate consumer protections; or (3) damage to the public interest.²⁰ Qwest seeks forbearance from enforcement of as many as three statutes, twenty-one sections or subsections of the Commission's rules, and the Commission's Comparably Efficient Interconnection and Open Network Architecture requirements.²¹ Each of these requests must be scrutinized, individually and on a granular, market-by-market or wire center-by-wire center basis, to determine whether it satisfies Section 10(a) for both mass market and enterprise services.

¹⁸ Indeed, in Omaha and Anchorage, the Commission found that MSA-level data will not be granular enough to justify forbearance from Section 251 and other incumbent LEC regulations throughout a given market and granted forbearance only in those wire centers where the incumbent demonstrated widespread deployment of competitive facilities, and left those regulations in place where competitive facilities were less prevalent. *See Omaha Forbearance Order*, 20 FCC Rcd at 19450-51 (forbearance granted in nine of twenty-four wire centers); *Anchorage Forbearance Order*, 22 FCC Rcd at 1960 (forbearance granted in five of eleven wire centers).

¹⁹ *See Omaha Forbearance Order*, 20 FCC Rcd at 19423-24.

²⁰ *See* 47 U.S.C. at § 160(a)(1)-(3).

²¹ *See* Phoenix Petition at 3.

This claim-by-claim analytic framework is demanded by Section 10(a) and is consistent with the Commission's approach in the *Omaha Forbearance Order*.²² In that case, the Commission separately analyzed Qwest's bid for forbearance from dominant carrier regulations, Section 251(c) unbundling obligations, and Section 271 checklist requirements. Where applicable, the Commission further segregated its analysis to consider separately the impact of relief on the mass market and enterprise market segments and to determine whether competition was localized to a particular part of the Omaha MSA or was present market-wide. This analysis enabled the Commission to determine that relief from loop and transport unbundling was appropriate, but that Qwest's other Section 251(c)(3) obligations should remain in place.²³ It also led the Commission to limit unbundling relief to only those areas that met a certain threshold of competitive facilities deployment.²⁴ The Commission followed an even more granular approach in the *Anchorage Forbearance Order*, limiting the loop and transport unbundling it ordered to exclude subloops and requiring ACS to adopt specific terms for wholesale offerings designed to replace unbundled network elements.²⁵

This fact- and market-specific analysis of Qwest's petitions is particularly important in this case, given the number of forbearance requests in this proceeding and the high-population markets where forbearance is sought. The same close attention to detail employed in the Omaha and Anchorage proceedings is necessary here to ensure that consumers are not harmed by an overhasty relaxation of regulations designed to ensure free and fair competition in all markets.

C. The Commission Should Grant Forbearance Only for the Specific Rules Qwest Has Identified.

The Commission should strictly limit any relief it grants to the rules specifically identified by Qwest.²⁶ The *Omaha Forbearance Order* held that a party must identify clearly

²² See *Omaha Forbearance Order*, 20 FCC Rcd at 19424-25.

²³ See *id.* at 19456.

²⁴ See *id.* at 19446.

²⁵ See *Anchorage Forbearance Order*, 22 FCC Rcd at 1977.

²⁶ See *supra* n.9 and accompanying text.

and specifically the forbearance relief it seeks or face dismissal.²⁷ This limitation is particularly important in the Section 251 context because that statutory provision and the rules implementing it are the primary lever Congress and the Commission have created for opening incumbent LEC markets. Qwest has identified the provisions that correspond to Sections 51.319(a), (b), and (e) of the Commission's rules as the specific Section 251(c) obligations from which it seeks relief. These rules include the requirements that incumbent LECs provide loops, subloops, and transport facilities. Regardless of how it handles these requests, the Commission should make absolutely clear that it will not grant forbearance to Qwest for any other provision of the Commission's Section 251 implementing rules.²⁸

III. QWEST FAILS TO PROVIDE THE EVIDENCE NECESSARY TO EVALUATE ITS SECTION 251 FORBEARANCE REQUESTS.

Analysis of the Phoenix Petition under the applicable legal standards demonstrates that there is no basis for granting the requested relief from Section 251 and other incumbent LEC regulations. In light of the Commission's previous forbearance orders, an acceptable forbearance showing must include an identification of the wire centers in the Phoenix MSA and a demonstration of which competitors provide or are capable of providing facilities-based competition in each. Consistent with the Omaha and Anchorage Orders, Qwest must submit evidence of which wire centers feature a competitor whose facilities reach seventy-five percent

²⁷ See *Omaha Forbearance Order*, 20 FCC Rcd at 19424-25 & n.51 (citing Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, *Memorandum Opinion and Order*, 17 FCC Rcd 27000, 27005-06).

²⁸ See *Omaha Forbearance Order*, 20 FCC Rcd at 19456; *Anchorage Forbearance Order*, 22 FCC Rcd at 1971 & n.70 (noting the continued applicability of ACS's 251(c)(3) obligations other than the limited loops and transport unbundling relief specifically granted). In particular, the Commission should refrain from granting wider relief than Qwest has sought, even where the reasons for the limited scope of the request are not immediately apparent. For example, though Qwest seeks forbearance from the requirement that it provide unbundled inside wire subloops pursuant to Section 51.319(b) of the Commission's rules, it does not seek forbearance from the requirement that it provide unbundled access to its network interface devices ("NIDs") pursuant to Section 51.319(c). Accordingly, the Commission should not consider forbearance from that subsection.

(75%) or more of end user locations. Moreover, an appropriate showing must demonstrate how competitive facilities deployment justifies each of Qwest's separate forbearance requests.

Ignoring the Commission's standards, however, Qwest provides wire center-based facilities deployment data only sparingly, and fails to demonstrate that any competitor has deployed sufficient facilities in any wire center to justify forbearance. Instead of focusing on competitive facilities deployment, Qwest relies almost exclusively on market-share data it claims demonstrates that competitors are increasing their market share at Qwest's expense. Qwest's argument boils down to an assertion that it is entitled to forbearance because it has lost market share while competitors have gained it. Yet the Commission specifically rejected this argument as a basis for Section 251 forbearance in the *Omaha Forbearance Order*, holding that forbearance is warranted "only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected."²⁹ As the Commission explained in the *Anchorage Forbearance Order*, "our reliance on extensive facilities-based coverage for determining where forbearance is warranted stems from the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention."³⁰ Thus, while market data like that provided by Qwest may be useful as background, the facilities deployment data that is nearly absent from the Phoenix Petition is the *sine qua non* of forbearance relief. Qwest fails to provide that data, and the Phoenix Petition consequently must be denied.

A. Qwest's Market Share Analysis Is Flawed and, in Any Case, Insufficient to Justify Section 251 Forbearance Relief.

Qwest devotes the bulk of its petition and the accompanying declaration to demonstrating the company's line losses over the past 6 years.³¹ By concentrating on market-share data, the

²⁹ *Omaha Forbearance Order*, 20 FCC Rcd at 19445.

³⁰ *Anchorage Forbearance Order*, 22 FCC Rcd at 1977.

³¹ See Phoenix Petition at 17-19, 27-28, Declaration of Robert H. Bringham and David L. Teitzel at 3-7 (the "Bringham and Teitzel Declaration").

Phoenix Petition repeatedly seeks to substitute evidence of the competitive presence of other communications companies in the market for the evidence that the Commission actually requires, *i.e.* evidence of competitive facilities deployment and the capability of competitors to directly compete with Qwest without reliance on the Qwest network. The relevant question for Section 251 forbearance under Section 10 of the Act is whether a competitive market has developed in a way that makes the statutory and regulatory supports designed to further competition unnecessary. Qwest's Phoenix Petition, with its reliance on its own purported market share loss, simply fails to make that showing.

Even taking Qwest's showing on its own terms, however, much of the information Qwest provides is exaggerated and incomplete. For example, Qwest complains that its share of "residential communications connections" has declined from 60% in 2000, to only 24% in 2006.³² Qwest fails to explain, however, that most of that "decline" is attributable to the growth in the number of wireless, broadband, and voice over-IP lines in service, which Qwest includes in the denominator of its market share equation. The Commission has repeatedly found that those services are largely complementary to, and not a substitute for, the wireline services relevant to the forbearance analysis.³³ Moreover, Qwest makes no effort to adjust the data it presents to reflect its actual market position, preferring to provide data that appear to show a company in steep decline. Qwest fails to acknowledge that the overall telecommunications pie in Phoenix and nationwide has grown immensely, and Qwest's decline in "residential communications connections" merely shows that it has not dominated new market segments. The data do nothing to show that Qwest's dominance of its traditional market segment – which Section 251 is designed to ameliorate – has declined substantially.³⁴

³² See Phoenix Petition at 18; Bingham and Teitzel Declaration at 5-6.

³³ See *Omaha Forbearance Order*, 20 FCC Rcd at 19452; *Anchorage Forbearance Order*, 22 FCC Rcd at 1976 (rejecting argument that interconnected voice over IP and wireless services are substitute services in the Anchorage study area).

³⁴ Similarly, Qwest's citation of its decline in residential retail lines in service proves little about its actual place in the market. See Phoenix Petition at 2, 17. Qwest fails to account for the

B. Qwest Provides No Basis for the Commission to Overturn Its Previous Rejection of Efforts to Rely on Competition from Complementary Services.

Qwest argues that the Commission should consider the extent of competition that Qwest experiences from wireless and voice over IP providers as evidence that forbearance is appropriate for mass market services.³⁵ The Commission should rebuff this effort, as it has twice before.³⁶

In the Omaha forbearance proceeding, the Commission rejected evidence of competition from wireless providers because Qwest failed to show that wireless or voice over IP service had become a full substitute for landline telephone service or that significant numbers of customers actually had begun making that substitution.³⁷ The Commission took the same approach just a few months ago in rejecting the insubstantial information regarding such competition in the *Anchorage Forbearance Order*.³⁸ Qwest provides no basis for the Commission to reverse itself in this case.

In the first place, Qwest provides no evidence that wireless service now has become a meaningful substitute for landline telephone service in Phoenix. Wireless is supplemental to wireline service for most local telephone customers, who maintain both services because each

reality that every lost residential access line does not represent a lost customer. Many of these "lost" lines have converted second voice lines in their homes to data lines or have replaced second lines with Qwest or other providers' wireless service. Qwest is aware of these shortcomings in its data, *see* Bingham and Teitzel Declaration at 29, but it makes no effort to quantify how these developments affect Qwest's actual market position.

³⁵ *See* Phoenix Petition at 10-14.

³⁶ For instance, Qwest's evidence regarding competition from wireless carriers (which is defective on a number of additional grounds discussed below) and "over-the-top" voice over IP providers consists almost entirely of speculation based on purported nationwide and statewide trends that have no relevance to the Commission's inquiry into demonstrated competition in the Phoenix MSA. *See* Phoenix Petition at 10-15. The Commission correctly rejected this type of undifferentiated, anecdotal, and geographically irrelevant evidence of wireless competition in the Omaha and Anchorage proceedings, and it should reject Qwest's equally generic claims here. *See Omaha Forbearance Order*, 20 FCC Rcd 19452; *Anchorage Forbearance Order*, 22 FCC Rcd at 1976; *see also infra*, Section III.B.

³⁷ *See Omaha Forbearance Order*, 20 FCC Rcd at 19452.

³⁸ *See Anchorage Forbearance Order*, 22 FCC Rcd at 1976 (rejecting argument that interconnected voice over IP and wireless services are substitute services in the Anchorage study area).

meets different needs. Qwest concedes this point when it admits that “Qwest does not maintain that wireless service is viewed by every customer in the Phoenix MSA as a complete substitute for traditional wireline service.”³⁹ For that reason, the “widespread availability” of wireless services cited by Qwest adds nothing to the analysis of whether sufficient substitute services exist to justify forbearance.

Nonetheless, Qwest relies on a collection of irrelevant and unreliable data to argue that wireless competition should be considered. For instance, Qwest presents wireless growth data for the state of Arizona.⁴⁰ This state-wide data is useless because it does not relate directly to the Phoenix MSA or the individual wire centers where Qwest seeks forbearance.⁴¹ Similarly, Qwest presents the results of a private “survey” showing that 13.5% of “Phoenix-area” residents no longer receive wireline service.⁴² Qwest does not indicate what the geographical coverage of the “Phoenix-area” is, so this data is of no help in determining whether customers in the Phoenix MSA or in Qwest’s individual wire centers actually view wireless as a true substitute for landline telephone service. Indeed, this evidence is beyond evaluation because Qwest includes none of the methodology that would be necessary to determine whether the “survey” was conducted in a way that would yield reliable results or the extent to which this is a change from prior conditions.⁴³ Without some evidence of the veracity of the “survey,” the Commission should not give it any weight.

³⁹ Bingham and Teitzel Declaration at 32.

⁴⁰ See Bingham and Teitzel Declaration at 28.

⁴¹ Moreover, Qwest acknowledges that it provides wireless service in Phoenix, though it seeks to minimize its market share at every turn. See Phoenix Petition at 14 & n. 34 (citing Bingham and Teitzel Declaration, n.17). Qwest makes no effort to factor its wireless market gains into its purported market-share loss analysis.

⁴² See Phoenix Petition at 11-12; Bingham and Teitzel Declaration at 30.

⁴³ The Commission’s own data indicate that more than nearly six percent (6%) of Arizona households do not have any telephone service. See Telephone Subscribership in the United States, Industry Analysis and Technology Division at Table 2 (released June 7, 2007), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-274714A1.pdf.

Qwest also cites cases where the Commission has noted the growth of wireless-only households.⁴⁴ None of these cases, however, suggests a change in the forbearance standard announced in the Omaha and Anchorage forbearance proceedings. Qwest's attempt to find relevance to this proceeding in the Commission's findings in the *AT&T/SBC Merger Order* is particularly misplaced. In that case, the Commission merely cited its earlier findings that some consumers are opting to substitute wireless for wireline services.⁴⁵ This has no impact on the searching, granular analysis required by forbearance proceedings like this one, particularly because the *AT&T/SBC Merger Order* was adopted more than a year before the *Anchorage Forbearance Order*.⁴⁶

Qwest also attempts to include voice over IP providers in both its mass market and enterprise services analysis.⁴⁷ In Omaha and Anchorage, the Commission rejected evidence of voice over IP competition on the basis that it is not a true substitute for landline services.⁴⁸ Qwest provides no evidence to challenge, let alone refute, that conclusion.⁴⁹ Instead, Qwest relies on the growth of nationwide broadband penetration and speculation about the expected

⁴⁴ See Phoenix Petition at 12-13 (citing Annual Report and Analysis of Competitive Markets with Respect to Commercial Mobile Services, *Tenth Report*, 20 FCC Rcd 15908, 15984); see also AT&T, Inc. and BellSouth Corporation Application for Transfer of Control, *Memorandum Opinion and Order*, 22 FCC Rcd 5662 (2007) (the "*AT&T/SBC Merger Order*").

⁴⁵ See *AT&T/SBC Merger Order*, 22 FCC Rcd at 5714 (citing *SBC/AT&T Order*, 20 FCC Rcd at 18340-42; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21558).

⁴⁶ Qwest also notes a 2004 analyst estimate that by 2008, more than a third of U.S. wireless subscribers will no longer receive wireline telephone service. See Bingham and Teitzel Declaration at 30. This dated projection actually works against Qwest because even Qwest's most optimistic evidence shows that consumers have been much slower to "cut the cord" than analysts were expecting in 2004. Given these many and varied defects, none of Qwest's data or argument remotely suggests that the Commission should change its approach to excluding wireless carriers from the forbearance analysis.

⁴⁷ See Phoenix Petition at 14-16, 25-26; 32-37.

⁴⁸ See *Omaha Forbearance Order*, 20 FCC Rcd at 19452; *Anchorage Forbearance Order*, 22 FCC Rcd at 1976.

⁴⁹ Qwest obliquely claims that "VoIP calls do not rely on Qwest's switched network," but this is simply false. Phoenix Petition at 14. To complete calls to Qwest landline customers, voice over-IP calls must be routed over Qwest's local loop facilities. Qwest may be referring to computer-to-computer voice over IP services like Skype, but since these services cannot facilitate calls to all telephone customers, they cannot be considered a substitute for traditional landline services.

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growth in the voice over IP market. These claims say nothing about the state of facilities-based competition in any part of the Phoenix MSA and are of dubious reliability. In fact, SunRocket, which Qwest describes as a competitor in the residential market, stopped serving its customers – in many cases, without any notice – in mid-July and has announced that it is going out of business.⁵⁰ For the enterprise market, Qwest relies solely on data about the use of voice over IP services by “North American Organizations.”⁵¹ This data falls far short of the granularity the Commission required in the Omaha and Anchorage forbearance orders.

C. Qwest’s Reliance on Non-Carrier Network Providers Is Too Vague to Warrant Consideration.

Qwest’s reliance on enterprise competition from “systems aggregators” and other non-traditional competitors to support its forbearance requests also is unavailing. Qwest cites the deployment of “extensive competitive fiber networks” by non-carriers, but it fails to explain how these fiber networks actually factor into the competitive market in Phoenix.⁵² Qwest claims that such networks are being used to serve enterprise customers in buildings in Phoenix, but fails to specify what services these networks deliver.⁵³ Indeed, though Qwest identifies a few of these purported competitors, it fails to provide any information about their businesses or the extent of the competitive threat they pose.⁵⁴

⁵⁰ See Petition at 15; Bingham & Teitzel Declaration at 33; see also *For SunRocket Customers, Sounds of Silence*, Kim Hart, WASHINGTON POST, July 19, 2007, page D1; see also Critical Notice to SunRocket Customers, available at <http://www.sunrocket.com/> (explaining that service to all customers would be terminated no later than August 5, 2007). Even the largest voice over IP provider, Vonage, faces significant legal and financial issues. See, e.g., *Vonage Ordered to Pay Verizon in Patent Case*, Alan Sipress, THE WASHINGTON POST, March 9, 2007, page D1; *Sprint’s Patent Lawsuit Against Vonage on Track for Trial This Fall*, Jason Gertzen, THE KANSAS CITY STAR, August 10, 2007, available at <http://www.kansascity.com/business/story/227362.html>.

⁵¹ See Phoenix Petition at 25.

⁵² See *id.* at 26-27.

⁵³ See *id.* at 26.

⁵⁴ As with voice over IP services, Qwest claims that these fiber networks can be used to “bypass” Qwest’s network, but this is simply false. Bingham and Teitzel Declaration at 26. In most cases, an enterprise market service provider must be capable of giving customers access to all local customers, which would require interconnection with Qwest’s ubiquitous network.

Qwest makes much of its assertion that these “competitive fiber networks” reach a significant number of Qwest’s wire centers,⁵⁵ but it provides no useful data about how much of each wire center these alleged competitors actually serve. To rely on these “competitive fiber networks,” Qwest must show that these networks actually are providing services that compete with Qwest’s mass market and enterprise service offerings. Qwest, however, provides no specific information about any of these alleged competitors or their fiber networks. Qwest provides no evidence of whether this fiber is lit or dark, of whether it is made available to third parties, or even of its capacity. Qwest must have some evidence to support its assertion that these parties are competing for Phoenix customers, but it has not provided that evidence in the Phoenix Petition. Consequently, Qwest’s assertion that fiber-based non-competitive LEC competitors have laid fiber in a certain percentage of the wire centers Qwest serves is useless in determining how many customers in any of those wire centers actually could use that fiber to fulfill their telecommunications needs.⁵⁶

Similarly, Qwest claims that additional “systems integrators” contribute to enterprise competition in the Phoenix MSA.⁵⁷ These supposed competitors, however, typically provide no telecommunications services of their own, but merely combine other parties’ services with non-telecommunications components. Qwest provides only speculation about how these actors are affecting the market and provides no evidence at all that they are providing customers with additional competitive choices, rather than providing customers with another way to purchase services often provided by Qwest. Moreover, Qwest provides no hard data about the extent of competition from systems integrators, so the Commission would have no dependable way to factor it into its analysis even if it were relevant.

⁵⁵ See Phoenix Petition at 25; Bingham and Teitzel Declaration at 26-27.

⁵⁶ See Bingham and Teitzel Declaration at 26-27. The map Qwest provides is little help in this regard, because Qwest offers no way for the Commission to tell the capacity of these networks or the geographical reach within any given wire center of any particular route. See Phoenix Petition, Confidential Exhibit 4. Moreover, it is clear from the map that large expanses of the Phoenix MSA are not served by these competitive fiber networks.

⁵⁷ See *id.* at 25-26.

D. Qwest' Analysis of Traditional Wireline Competitive LEC Market Penetration Is Facile and Incomplete.

Qwest's submission regarding wireline competitive LECs does not satisfy the Omaha forbearance standard because Qwest fails to provide any evidence of where competitors have deployed their own facilities.⁵⁸ Qwest provides the raw number of competitive LECs providing service in Phoenix and, for some competitors, estimates of the number of miles of fiber they have deployed, but this is nowhere near the level of granular data the Commission required in the Omaha and Anchorage cases. Indeed, Qwest's presentation of this data barely distinguishes between carriers that rely on Qwest facilities and those that do not, despite the Commission's past emphasis on the importance of true facilities-based competition to the Section 251 forbearance analysis. With respect to wireline competitive LECs, Qwest provides no information comparable to the comprehensive deployment data the Commission required in the Omaha and Anchorage proceedings. Indeed, Qwest makes no effort whatsoever to show which wire centers have experienced competitive facilities deployment from wireline competitive LECs.

Instead, Qwest relies on the raw numbers of competitive LECs and estimations of competitive LEC lines in service to paint a picture of robust competition from wireline competitive LECs. Qwest estimates the number of competitive LEC mass market lines in service in the Phoenix MSA based on white-pages listings. The [confidential ****] competitive LEC lines Qwest estimates appear to show a robust traditional wireline competitive LEC market sector.⁵⁹ A close look at Qwest's data, however, shows that Qwest estimates more than [confidential ****] of that figure comes from competition provided by Cox, to which Qwest

⁵⁸ See Phoenix Petition at 9-10, 23-25.

⁵⁹ See *id.* at 10. Qwest's estimation methodology also is suspect. Qwest presumes that competitive LEC customers will list their numbers in the white pages at the same rate as Qwest customers. Applying a listing factor of 75%, Qwest deduces a total of approximately [confidential ****] competitive LEC lines in service from about [confidential ****] actual competitive LEC white pages listings.

dedicates a separate portion of the Phoenix Petition.⁶⁰ Qwest's presentation appears to show a traditional wireline competitive LEC penetration that is [confidential****] the level supported by Qwest's data.

Moreover, Qwest cites "competitive LEC" competition from AT&T and Verizon,⁶¹ though both of those companies have disavowed any intention to continue developing their residential competitive LEC businesses.⁶² Indeed, in the proceedings approving the AT&T/SBC and Verizon/MCI mergers, both these companies frankly admitted that they were withdrawing from the mass market outside their incumbent regions.⁶³ It would be incongruous, to say the least, if the Commission granted forbearance based on the competitive threat posed by companies with no intent to continue competing.

Qwest's presentation of enterprise market statistics for competitive LECs suffers from the same faults. Here again, although Qwest presents enterprise competition from Cox in a different section from that provided by competitive LECs, it provides the number of business lines served by all competitive LECs (including Cox) in the wireline competitive LEC section, effectively double-counting Cox and creating the impression that competitive LECs have gained a much greater portion of the enterprise market than they have.⁶⁴ Moreover, Qwest's extrapolation of enterprise lines from white pages listings is far less reliable in the enterprise context than in the mass market context, because in the enterprise context the listing factor for Qwest enterprise

⁶⁰ See Bingham and Teitzel Declaration at 16-17 (explaining its methodology for determining the number of competitive LEC customer lines in Phoenix MSA and using Cox as an exemplar of the type of facilities-based competitive LEC for which this methodology would identify customers). In the section devoted to competition from Cox, Qwest estimates that Cox serves 370,000 residential lines. See *id.* at 13. In that context, if Qwest's estimation of competition from Cox is correct, Qwest's actual data point for residential lines served by other wireline competitive LECs should, therefore, be [confidential ****], or just slightly more than [confidential****] of the households in the Phoenix MSA.

⁶¹ See *id.* at 17-18, 22-23.

⁶² See *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 18290, 18295 (2005); *Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd 18433, 18436 (2005).

⁶³ See *id.*

⁶⁴ See Phoenix Petition at 24.

lines is only 36%, which means that Qwest estimates [confidential****] business lines based on only about [confidential****] competitive LEC white pages listings.⁶⁵

Qwest's presentation of competitive data for wireline competitive LECs provides the Commission with no information that corresponds to the Commission's Section 251 forbearance test, and the data it does provide is speculative and disingenuously presented. For these reasons, the Commission should entirely disregard Qwest's claims of facilities-based competition from wireline competitive LECs.

E. Qwest's Claims Regarding Competition Provided by Cox Also Are Incomplete.

Cox is the only competitor for which Qwest even seeks to provide any of the type of facilities deployment data the Commission requires for analysis of Section 251 forbearance. The information Qwest provides, however, is incomplete, in some cases, incorrect, and insufficient to justify forbearance.

Qwest seeks to portray Cox as an MSA-wide competitor by claiming that Cox has deployed facilities that could serve most Qwest customers in the Phoenix MSA.⁶⁶ Even assuming Qwest's figures are correct, that fact alone would not justify forbearance in any wire center in the Phoenix MSA under the Commission's established test. The point of that test is to determine which wire centers have relatively ubiquitous competitive coverage. The Commission has not granted forbearance based on mere competitive presence in some small part of a given wire center or based on competitive deployment in a nearby wire center; it appropriately has insisted that an incumbent show a competitor has sufficient facilities deployment in each wire center to provide legitimate competition throughout that wire center. Therefore, Qwest's deployment data for Cox does not justify a determination that forbearance is warranted in any particular wire center in the Phoenix MSA.

⁶⁵ See *id.*

⁶⁶ See Phoenix Petition at 6-9.